91-929

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

SANTE KIMES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Did the United States Court of Appeals for the Ninth Circuit in the case below misapply this honorable Court's change of the interpretation of 18 U.S.C. § 1584—prohibiting the holding of another in involuntary servitude—as most recently enunciated in *United States v. Kozminski*, 487 U.S. 931 (1988)?

II. Does *Kimes v. United States*, 939 F.2d 776 (9th Cir. 1991), *reh'g denied*, —— F.2d —— (1991), conflict with decisions favored by this honorable Court in *United States v. Kozminski*, 487 U.S. 931 (1988) to such an extent that the ruling of the United States Court of Appeals for the Ninth Circuit perpetuates the conflict in the interpretations of 18 U.S.C. § 1584 among circuit court decisions resolved in *Kozminski*?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, SANTE KIMES, prays that a Writ of Certiorari [1] issue to review the Judgment of the United States Court of Appeals for the Ninth Circuit, *Kimes v. United States*, 939 F.2d 776 (9th Cir. 1991) *reh'g denied*, —— F.2d —— (1991), Slip Opinion (9th Cir. No. 89-15970, 9/12/91) which affirmed the United States District Court's Order denying Petitioner's Post-Conviction Motion filed pursuant to 28 U.S.C. § 2255.

This Honorable Court's change of the interpretation of 18 U.S.C. § 1584—prohibiting the holding of another in involuntary servitude—most recently enunciated in *United*

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[1] Pursuant to Rule 14.1(b) of the Supreme Court Rules the parties to this Petition are those identified in the caption.

States v. Kozminski, 487 U.S. 931, 108 S.Ct. 2751 (1988) was misapplied by the United States Court of Appeals for the Ninth Circuit which erroneously concluded that *Kozminski*'s reach was only ". . . aimed at excluding prosecutions under the statute for psychological coercion of the type of which cults are often accused." *Kimes v. United States*, *supra*, 939 F.2d at 778. Misinterpreting *Kozminski*, the Ninth Circuit clearly deprived Petitioner of the benefit of the change of the law announced by this Court in *Kozminski* by "finding" that, ". . . [b]ecause there was no evidence of this type of psychological coercion presented, the [jury] instruction at issue could not have resulted in an unlawful conviction." *Kimes v. United States*, *supra*, 939 F.2d at 778. (Emphasis added).

Next, and just as important, the interpretation of 18 U.S.C. § 1584 in the decision under review, *Kimes v. United States*, *supra* conflicts with the decisions favored by this Honorable Court in *Kozminski*, *supra* to such an extent that the ruling of the Ninth Circuit perpetuates the conflict in the interpretations of 18 U.S.C. § 1584 among the Circuit Court decisions sought to have been resolved in *Kozminski*.

STATEMENT OF THE GROUNDS ON WHICH CERTIORARI JURISDICTION IS INVOKED

Petitioner seeks a Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit, reproduced in full in Appendix "A," attached hereto. This published opinion of the Ninth Circuit was as a direct result of collateral proceedings in Petitioner's appeal of an Order of the United States District Court for the District of Nevada denying Petitioner KIMES' Motion to Set Aside or Vacate her Judgment filed pursuant to 28 U.S.C. § 2255, a federal habeas corpus proceeding. The District Court's Order was entered on June 27, 1989. The District Court Order denying Petitioner's Motion pursuant to 28 U.S.C. § 2255 is reproduced in Appendix "B" attached hereto.

The published opinion, *Kimes v. United States*, *supra*, Appendix "A" hereto, was the result of exhaustive briefing to the Ninth Circuit which issued its published opinion on July 24, 1991. Thereafter, Petitioner, through counsel, requested rehearing and the suggestion of rehearing *en banc*. In a brief Memorandum Order, the United States Court of Appeals for the Ninth Circuit denied rehearing and the suggestion for rehearing en banc on September 12, 1991. Slip Opinion, *Kimes v. United States*, —— F.2d —— (9th Cir. No. 89-15970, 9/12/91), attached hereto in Appendix "C."

The United States Supreme Court has jurisdiction to review the judgment below by Writ of Certiorari pursuant to 28 U.S.C. § 1254(1). See generally, *The Conqueror*, 166 U.S. 110, 113-114 (1896); *United States v. General Motors Corporation*, 323 U.S. 373, 377 (1944); and, *Nixon v. Fitzgerald*, 457 U.S. 731, 743 (1982).

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED IN THIS CASE

The Fifth Amendment to the Constitution of the United States provides in full:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U.S. Const.Amend. V.

The Thirteenth Amendment to the United States Constitution provides in full:

> "Section 1. Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2. Congress shall have power to enforce this article by appropriate legislation."

At all times herein relevant, § 1584 of Title 18 of the United States Code, entitled "Sale Into Involuntary Servitude," provided:

> "Whoever knowingly and willfully holds to involuntary servitude or sells into any condition of involuntary servitude, any person for any term, or brings within the United States any person so held, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

18 U.S.C. § 1584.

STATEMENT OF THE CASE

A. Procedural History Of The Federal Criminal Trial.

1. *The Indictment Charging Conspiracy, Involuntary Servitude And Other Crimes.*

On August 8, 1985, the Federal Grand Jury sitting in the United States District Court for the District of Nevada returned a 17 Count Indictment charging Petitioner SANTE KIMES and her husband, KENNETH, with violations of 18 U.S.C. § 1584, Involuntary Servitude, 8 U.S.C. § 1324(a)(2), Transportation of Illegal Aliens, 18 U.S.C. § 371, Conspiracy, and 18 U.S.C. § 2, Aiding and Abetting. Several months later on January 23, 1986, a Superseding Indictment was returned and charged the additional crimes of Escape, 18 U.S.C. § 751 (a) and Accessory After the Fact, 18 U.S.C. § 3.

The conspiracy count of the Superseding Indictment was by far the most extensive criminal charge against

Petitioner. The Indictment alleged that during a period of time from October, 1978 until October, 1985, the conspirators held domestic workers in involuntary servitude by preventing them, the victims, from leaving the employment and control of Petitioner and her husband. Eight domestic workers were named in Count I. The Superseding Indictment which was returned in January, 1986, several months after the original Indictment was filed, included eight substantive counts charging involuntary servitude whereby the victims were identical to those identified in the conspiracy charge.

Petitioner entered a plea of not guilty to all counts of the Superseding Indictment. Trial commenced in February, 1986. At the close of the case, counts IV and XII were voluntarily dismissed by the Government. The jury acquitted Petitioner on Counts V and VI, but found Petitioner guilty of the remaining counts, which included the conspiracy and several involuntary servitude charges.

In May, 1986, Petitioner was sentenced to the maximum imprisonment available under 18 U.S.C. § 1584, five years, on each of the 14 counts of which she was convicted. She was given concurrent sentences. [As a parenthetical remark, at the time Petitioner appealed the denial of her federal habeas corpus petition filed pursuant to 28 U.S.C. § 2255, Petitioner had completed her sentence of imprisonment and she was and remains at liberty. Her release did not affect the jurisdiction of the United States Court of Appeals to entertain the appeal. *Marshall v. United States*, 465 F.2d 966 (9th Cir. 1972)].

2. *Facts Related In The Criminal Trial.*

From October, 1978 until August, 1985, Petitioner, and as was alleged in the Indictment with the knowledge and assistance of her husband, Kenneth Kimes, supposedly enticed a number of illegal aliens to work as maids for the KIMES. The Government alleged that the KIMES transported these maids or arranged for their transportation

into or within the United States. As the "testimony" adduced at trial revealed, Petitioner and her husband used and threatened the use of physical or legal coercion to compel the maids to work for Petitioner against their will and for no pay. This was the essence of the Government's case against Petitioner.

The Government sought to prove that Petitioner, often accompanied by her husband, recruited some of the victims to be "enslaved" in California and Mexico. The California targets were supposed illegal aliens newly arrived in the United States from predominantly Spanish speaking countries and that Petitioner and her husband were aware of the status of these persons. The Government's case was further predicated upon assertions that those persons recruited in Mexico were illegally transported into California at Petitioner's direction, either in the trunks of automobiles or by river crossings at the border separating the United States of America and Mexico. Further, the Government's evidence sought to prove that Petitioner and her husband transported most of the victims by surface and air transportation from California to Las Vegas, Nevada or Honolulu, Hawaii with the victims many times accompanying the KIMES on their changes of residences in Las Vegas and Honolulu.

According to the Government's theory of Petitioner's covert plan to seek out "vulnerable victims", the Government's evidence attempted to show that the alleged victims were teenaged girls, one as young as fourteen years of age, who spoke little or no English, were poorly educated, unsophisticated and naive.

At trial and during briefing at all phases before the United States Court of Appeals for the Ninth Circuit in both the direct appeal and on appeal of the collateral attack of the District Court's denial of Petitioner's Motion filed pursuant to 28 U.S.C. § 2255, the Government made much of alleged threats made by Petitioner to the victims by informing the alleged victims that they would

be deported or thrown in jail by the authorities if they failed to obey Petitioner's orders.

B. Procedural History Of The Federal Habeas Corpus, 28 U.S.C. § 2255, Litigation.

1. *The Federal District Court Proceedings Resulting In The Denial Of The 28 U.S.C. § 2255 Motion.*

In July, 1988, Petitioner filed a Motion pursuant to 28 U.S.C. § 2255 to vacate, set aside, or correct her sentence. She was then in federal custody based on her conviction. The § 2255 Motion came after the United States Court of Appeals for the Ninth Circuit affirmed Petitioner's conviction.

The § 2255 Motion urged that the then recent decision of *United States v. Kozminski*, 487 U.S. 931, 108 S.Ct. 2751 (1988) provided a more favorable interpretation of the involuntary servitude statute, 18 U.S.C. § 1584, which rejected an expanded definition of involuntary servitude which included psychological manipulation because, as this Court reasoned,

> "[u]nder such a view, the statutes would provide almost no objective indication of conduct or condition they prohibit, and thus would fail to provide fair notice to ordinary people who are required to conform their conduct to the law."

Kozminski, supra, 108 S.Ct. at 2763.

Later, in September and October, 1988, the United States District Court for the District of Nevada, Honorable Howard D. McKibben, presiding, conducted an evidentiary hearing on Petitioner's claims raised in her § 2255 Motion. [Petitioner raised a juror misconduct issue in the collateral proceedings in District Court and later on appeal to the United States Court of Appeals for the Ninth Circuit. That juror misconduct issue is not raised in this Petition for a Writ of Certiorari.]

In June, 1989, the District Court denied Petitioner's requested relief. A copy of the District Court's Memo-

randum Order denying Petitioner's Motion pursuant to 28 U.S.C. § 2255 is reproduced in Appendix "B" hereto. Comparing the instructions given at Petitioner's trial with this Court's analysis of the jury instructions questioned in *Kozminski*, *supra*, the District Court below asserted:

> "The Court finds that the jury in this case was instructed in a manner not inconsistent wth *Kozminski*. The jury instructions discuss the requirement of coercion in terms that could, in light of the evidence against the defendant, only have been construed by the jurors to mean the kind of physical or legal coercion defined by *Kozminski*. The record supports this conclusion. It reflects that the jury acquitted the defendant on two counts of involuntary servitude in which there was no actual physical force used. Under Count V the jury acquitted the defendant. The only evidence against the defendant under Count V was that she raised her hand one time while yelling. There was no physical contact with the maid.
>
> The evidence under Count VI established there was no physical contact with the maid and that the defendant only made a fist and brought it close to the maid's face.
>
> A review of the record reveals that the jury convicted the defendant on only those counts which involved both physical and legal coercion. . . ."

Order Denying Petitioner's Motion Pursuant to 28 U.S.C. § 2255, pp. 6-7 (6/30/89), Appendix "B."

The denial of the Section 2255 Petition was appealed to the United States Court of Appeals for the Ninth Circuit.

2. *The Appellate Proceedings Concerning The 28 U.S.C. § 2255 Motion In The Ninth Circuit.*

Petitioner appealed the denial of her § 2255 Motion to the Ninth Circuit raising a number of issues including a challenge of her conviction for involuntary servitude,

her claims that she was deprived of her right to an unbiased jury when a hostile neighbor was permitted to serve as a juror and deprived of the effective assistance of counsel at trial and on appeal. The Ninth Circuit ruled against Petitioner in a published decision. See Appendix "A", Opinion, *Kimes v. United States*, 939 F.2d 776 (9th Cir. 1991), *reh'g denied*, —— F.2d —— (9th Cir. No. 89-15970, 9/12/91). A Petition for Rehearing and Suggestion of Rehearing En Banc was denied in a brief Memorandum Opinion filed on September 12, 1991. See, Appendix "C."

Rejecting Petitioner's claim that conviction was to be reversed due to the change of the interpretation of 18 U.S.C. § 1584—prohibiting the holding of another in involuntary servitude—enunciated by this Court in *United States v. Kozminski*, *supra*, the Court of Appeals attempted to restate Petitioner's argument as, ". . . the conduct for which she was convicted on the involuntary servitude counts [was] no longer illegal." *Kimes v. United States*, *supra*, 939 F.2d at 777 (emphasis added). The Court of Appeals acknowledged the *Kozminski* decision but did *not* discuss the critical fact that this Court specifically granted certiorari in *Kozminski* in the interpretations of 18 U.S.C. §§ 241 and 1584 to resolve the conflict in the interpretation of these statutes among several Circuit Courts of Appeals. *United States v. Kozminski*, *supra*, 108 S.Ct. at 2758. Glossing over the impact of *Kozminski*, the Ninth Circuit blandly asserted that:

> "[a]t the time of Kimes' trial, the law of the Ninth Circuit permitted a conviction for involuntary servitude where the means of compulsion used consisted of merely psychological coercion. See *United States v. Mussry*, 726 F.2d 1148 (9th Cir.) *cert. denied*, *sub nom. Singman v. United States*, 469 U.S. 855, 105 S.Ct. 180, 83 L.Ed.2d 114 (1984). Subsequently, the Supreme Court announced that psychological coercion is not sufficient to bring a defendant's conduct within the purview of the statute forbidding involuntary servitude. Rather, the defendant must be guilty

> of bringing physical or legal coercion to bear on the victim. *United States v. Kozminski*, 487 U.S. 931, 108 S.Ct. 2751, 101 L.Ed.2d 788 (1988)."

Kimes v. United States, *supra*, 939 F.2d at 778.

The Court of Appeals then erroneously interpreted how this Court defined involuntary servitude in *Kozminski*:

> "In *Kozminski*, the government had relied in part on a theory that the Kozminskis had 'brainwashed' their victims into remaining in their employ. . . . It was this theory that the court [in *Kozminski*] rejected. *Kozminski*, therefore, would require us to grant Kimes' Section 2255 petition if she had been convicted based upon evidence of psychological coercion in addition to evidence of legal and physical coercion. See *Reed v. Ross*, 468 U.S. 1, 17, 104 S.Ct. 2901, 2911, 82 L.Ed.2d 1 (1964) (where Supreme Court decision represents a clear break from prior law, it can be a basis for a collateral attack on a prior conviction). Kimes' failure to object to the jury instruction is not fatal to her petition, since well settled law precluded her at the time. *Id.*"

Kimes v. United States, *supra*, 939 F.2d at 778.

Then, in an almost remarkable statement limiting the rationale, reach, and reasoning of *Kozminski*, the Ninth Circuit determined that:

> "*Kozminski* was aimed at excluding prosecutions under statute for psychological coercion of the type of which cults are often accused. Because there was no evidence of this type of psychological coercion presented, the instruction at issue could not have resulted in an unlawful conviction."

Kimes v. United States, 939 F.2d at 776.

The Ninth Circuit affirmed the District Court's denial of the § 2255 Petition.

The instant Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit now follows.

REASONS WHY THE WRIT SHOULD BE GRANTED

There are two reasons why a Writ of Certiorari should be granted. First, the United States Court of Appeals for the Ninth Circuit in the case below misapplied this Honorable Court's change of the interpretation of 18 U.S.C. § 1584—prohibiting the holding of another in involuntary servitude. See, *United States v. Kozminski*, 487 U.S. 931, 108 S.Ct. 2751 (1988).

Here, the Court of Appeal's interpretation of severely and erroneously limited *Kozminski* to only those prosecutions where psychological coercion of the type of which cults are often accused. That the Ninth Circuit asserted that there was no evidence of psychological coercion in the case below is of no moment. Clearly, the misapplication of *Kozminski* by the limitation of this Court's interpretation of 18 U.S.C. § 1584 led the Ninth Circuit to an erroneous conclusion which did not account for *Kozminski*'s rejection of the reasoning of *United States v. Mussry*, 726 F.2d 1448 (9th Cir.), *cert. denied, sub nom., Singman v. United States*, 469 U.S. 855, 105 S.Ct. 180, 83 L.Ed.2d 114 (1984), by favoring the decisions of other Circuit Courts of Appeal which had the opportunity to interpret 18 U.S.C. § 1584.

Second, to allow the published decision of the Ninth Circuit to stand without clarification by this Honorable Court would permit the Court of Appeals maverick application of *Kozminski* to perpetuate the conflict among federal appellate decisions resolved in *Kozminski*. This Court has long held to the proposition that it is emphatically the province and duty of the judicial branch of government to say what the law is and to interpret the laws of the United States. *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed.60 (1803); and, *Cooper v. Aaron*, 358 U.S. 1, 17 (1958). Only by granting certiorari to correct the manifest injustice represented by the decision of the United States Court of Appeals for the Ninth

Circuit will this Court's interpretation of 18 U.S.C. § 1584 in *Kozminski*, *supra*, have any true national impact.

ARGUMENT

I. THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN THE CASE BELOW MISAPPLIED THIS HONORABLE COURT'S CHANGE OF THE INTERPRETATION OF 18 U.S.C. § 1584—PROHIBITING THE HOLDING OF ANOTHER IN INVOLUNTARY SERVITUDE—AS MOST RECENTLY ENUNCIATED IN *UNITED STATES v. KOZMINSKI*, 487 U.S. 931 (1988).

The decision of the United States Court of Appeals for the Ninth Circuit under review, *Kimes v. United States*, 939 F.2d 776 (9th Cir. 1991), *reh'g denied*, —— F.2d —— (9th Cir. 1991), was quite direct, but erroneous in its narrow channeling of this Court's decision in *United States v. Kozminski*, 487 U.S. 931 (1988), by pigeonholing *Kozminski*'s rationale, reach, and reasoning to exclude only those cases under 18 U.S.C. § 1584 for psychological coercion of the type of which cults—undefined by the Ninth Circuit—are often accused or associated. *Kimes v. United States*, 939 F.2d at 778. It is this erroneous and narrowed interpretation which caused the Ninth Circuit, in Petitioner's estimation, to literally reject the scope of *Kozminski*.

For instance, the Court of Appeals did not bother to address in the reported decision that its prior interpretation of 18 U.S.C. § 1584 in *United States v. Mussry*, 726 F.2d 1448 (9th Cir. 1984), *cert. denied*, *sub nom.*, *Singman v. United States*, 469 U.S. 855, 105 S.Ct. 180, 83 L.Ed.2d 114 (1984), itself, was rejected by *Kozminski* as this Court's majority agreed with and favored other Circuit Court of Appeals' interpretations of the meaning of 18 U.S.C. § 241 and 18 U.S.C. § 1584, two criminal statutes enacted by Congress to specifically enforce the provisions of the Thirteenth Amendment to the Constitution of the United States. *United States v. Kozminski*,

supra, 108 S.Ct. at 2763-5; compare, *United States v. Kozminski*, 821 F.2d 1186 (6th Cir. 1987) with *United States v. Shackney*, 333 F.2d 475 (2d Cir. 1964) and *United States v. Mussry*, *supra*; see also, *United States v. Warren*, 772 F.2d 827 (11th Cir. 1985). It cannot be argued successfully to the contrary that the Court of Appeal's interpretation of *Kosminski* is not in step with this Court's current definition of involuntary servitude for the purposes of a criminal prosecution under 18 U.S.C. § 1584. A review of *Kozminski* sustains this position.

At trial in the *Kozminski* case, the trial court issued the following instruction on the law of involuntary servitude in a criminal prosecution under 18 U.S.C. § 241 (prohibiting a conspiracy to interfere with an individual's Thirteenth Amendment right to be free from "involuntary servitude") and § 1584 (prohibiting the holding of another in involuntary servitude):

> "'Involuntary servitude' consists of two terms.
>
> Involuntary means 'done contrary to or without choice'—'compulsory'—'not subject to control of the will.'
>
> Servitude means '[a] condition in which a person lacks liberty especially to determine one's course of action or way of life'—'slavery'—'the state of being subject to a master.'
>
> Involuntary servitude involves a condition of having some of the incidents of slavery.
>
> It may include situations in which persons are forced to return to employment by law.
>
> It may also include persons who are physically restrained by guards from leaving employment.
>
> It may also include situations involving either physical and other coercion, or a combination thereof, used to detain persons in employment.
>
> * * * *

> In other words, based on all the evidence it will be for you to determine if there was a means of compulsion used, sufficient in kind and degree, to subject a person having the same general station in life as the alleged victims to believe they had no reasonable means of escape and no choice except to remain in the service of the employer."

United States v. Kozminski, supra, 108 S.Ct. at 2756-7 (quoting App. to Pet. for Cert. 109a-110a).

On rehearing after a divided panel the Sixth Circuit affirmed the Kozminskis' convictions, the Sixth Circuit sitting en banc reversed and remanded for a new trial determining that the trial court's definition of involuntary servitude was "too broad." *United States v. Kozminski, supra*, 108 S.Ct. at 2757. On certiorari to the United States Court of Appeals for the Sixth Circuit, four members of this Honorable Court, including the Chief Justice, agreed with Justice O'Connor's rejection of the Government's position arguing for a "broad construction" of involuntary servitude:

> ". . . which would prohibit the compulsion of services by any means that, from the victim's point of view, either leaves the victim with no tolerable alternative but to serve the defendant or deprives the victim of the power of choice. Under this interpretation, involuntary servitude would include compulson through psychological coercion as well as most any other type of speech or conduct intentionally employed to persuade a reluctant person to work."

United States v. Kozminski, 108 S.Ct. at 2763.

Next, the opinion of the majority of this Court—an opinion in which all of the separately concurring or joining Justices agreed with the judgment—rejected the Government's narrow interpretation and restriction of §§ 241 and 1584 of Title 18 of the United States Code to "depend entirely upon the victim's state of mind." *United States v. Kozminski, id.* Not unlike the Ninth Circuit's narrow channeling of *Kozminski* as more fully argued below, the

Government's definition of § 1584 was too restrictive for this Court to tolerate:

> "Under such a view, the statutes would provide almost no objective indication of the conduct or condition they prohibit, and thus would fail to provide fair notice to ordinary people who are required to conform their conduct to the law. The government argues that any such difficulties are eliminated by a requirement that the defendant harbor a specific intent to hold the victim in involuntary servitude. But in light of the government's failure to give any objective content to its construction of the phrase 'involuntary servitude,' this specific intent requirement amounts to little more than an assurance that the defendant sought to do 'and unknowable something'. *Screws v. United States*, 325 U.S. [91] at 105 (1945)]."

United States v. Kozminski, supra, 108 S.Ct. at 2763.

Concluding that it was not the intent of Congress that 18 U.S.C. § 1584 encompass the "broad and undefined concept of involuntary servitude urged upon [this Court] by the government. . . ." *Id.*, this Court's five-member majority agreed with Circuit Judge Friendly's assessment in *United States v. Shackney*:

> "[t]he most ardent believer in civil rights legislation might not think that cause would be advanced by permitting the awful machinery of the criminal law to be brought into play whenever an employee asserts that his will to quit has been subdued by a threat which seriously affects his future welfare but as to which he still has a choice, however, painful."

United States v. Shackney, supra, 333 F.2d at 487.

The "amorphous" definitions of involuntary servitude proposed by the Government in *Kozminski, supra*, and the similarly flawed logic of the Ninth Circuit in *Kimes v. United States, supra*, are misfocused. As reasoned by this Honorable Court, such interpretations are violative of established principles of statutory construction.

> "By construing § 241 and § 1584 to prohibit only compulsion of services through physical or legal coercion, we adhere to the time-honored interpretive guideline that uncertainty concerning the ambit of criminal statute should be resolved in favor of lenity. See, *e.g.*, *McNally v. United States*, 483 U.S. —— (1987); *Dowling v. United States*, 473 U.S. 207, 229 (1985); *Liparota v. United States*, 471 U.S. 419, 427 (1985); *Rewis v. United States*, 401 U.S. 808, 812 (1971). The purposes underlying the rule of lenity—to promote fair notice to those subject to the criminal laws, to minimize the risk of selective or arbitrary enforcement, and to maintain the proper balance between Congress, prosecutors, and the courts —are certainly served by its application in this case."

United States v. Kozminski, *supra*, 108 S.Ct. at 2764.

In a clear statement this Court held that:

> ". . . for purposes of criminal prosecution under § 241 or § 1584, the term 'involuntary servitude' necessarily means a condition of servitude in which the vietim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process. This definition encompasses those cases in which the defendant holds the victim in servitude by placing the victim in fear of such physical restraint or injury or legal coercion. Our holding does not apply that evidence of other means of coercion, or of poor working conditions, or of the victim's special vulnerabilities is irrelevant in a prosecution under these statutes. As we have indicated, the vulnerabilities of the victim are relevant in determining whether the physical or legal coercion or threates thereof could plausibly have compelled the victim to serve. . . . *We hold only that the jury must be instructed that compulsion of services by the use or threatened use of physical or legal coercion is a necessary incident of a condition of involuntary servitude.*

> The District Court's instruction on involuntary servitude, which encompassed other means of coercion, may have caused the Kozminskis to be convicted for conduct that does not violate either statute. Accordingly, we agree with the court of appeals that the convictions must be reversed and the case remanded for a new trial."

United States v. Kozminski, supra, 108 S.Ct. 2765. (Emphasis added).

The chief defect in the Ninth Circuit's analysis of the instruction given in the District Court proceedings below is identical to the Government's questioned logic rejected wholeheartedly by this Court in *Kozminski*: the District Court's instructions on involuntary servitude may have encompassed other means of coercion and therefore may have caused SANTE KIMES to be convicted for conduct which does not violate 18 U.S.C. § 1584. The defective instructions by the District Court were:

> "Now, Counts II, III, V, VI, VII, VIII and IX of the Indictment charge the defendant, Santee [sic] Kimes and Kenneth Kimes, with having violated § 1584 of Title 18 of the U.S. Code. Each of those Counts are Counts relating to the crime of involuntary servitude and aiding and abetting.
>
> * * * *
>
> Before a verdict of guilty may be found as to each of these Counts, the Government must prove the following elements of the offenses charged in Counts II, III, V, VI, VII, VIII and IX beyond a reasonable doubt. Andthese are the elements: First. A holding of the named victim to involuntary servitude by the defendant. Second. Such holding must have been accomplished by the defendant knowingly and willfully. And third. Such holding must have been for a term. The first element is that the victim must have been held in a state of involuntary servitude by the defendant. Let me explain to you what the words involuntary servitude mean. Involuntary servitude

> means a condition of enforced compulsory servitude of one to another. The means used to compel a person to perform servitude are immaterial. In considering whether a defendant held certain persons in a condition of compulsory service, that is, whether the service was involuntary, you may consider the evidence of force, threats, intimidation or other means of compulsion. You may consider whether the defendant used means of compulsion sufficient in kind and degree to subjugate the will of an ordinary person having the same general station in life and background and experience as that of the alleged victims and to cause the alleged victims to believe that they had no reasonable means of escape and no choice except to remain in the service of Santee [sic] Kimes and Kenneth Kimes.
>
> * * * *
>
> The crucial factor is whether a person intends to and does coerce an individual into her service by subjugating the will of the other person. A holding in involuntary servitude occurs when an individual coerces another into her service by improper or wrongful conduct that is intended to cause and does cause the other person to believe that she has no alternative but to perform the labor."

Excerpts of Pertinent Jury Instructions Given At Trial: *United States v. Sante Kimes, et al.*, Case No. CR-LV-85-134 HDM (D.Ct. Nev. 2/27/86) (Tr. 131-1336), Appendix "F", attached hereto.

Clearly, Petitioner has been convicted by the use of a broader definition of involuntary servitude than that established by this Court in *Kozminski*. The Government's involuntary servitude theory, as expressed in its closing and rebuttal arguments (see Appendix "D", Excerpts of Government's Summation at Trial and Appendix "E", Excerpts of Government's Rebuttal at Trial) and the challenged instruction to the jury was that Petitioner, in part, coerced the victims and overcame their wills to hold them

in involuntary servitude: a position substantively identical to that condemned in *Kozminski* where the Government advanced an interpretation of § 1584 to depend entirely on the victim's state of mind. The last paragraph of the instruction at issue in this case conclusively demonstrates that the District Court focused the attention of Petitioner's jury on the victim's state of mind. The theory of the Government was undoubtedly based, in substantial part, on the rationale and definition of involuntary servitude noted in the now rejected logic of *United States v. Mussry, supra.*

The instruction in the District Court proceedings below was overly broad, not unlike the seriously questioned instruction in *Kozminski, supra,* which allowed the jury to convict petitioner for involuntary servitude by physical or legal coercion *or* by other means. There is no substantive difference between the District Court's instruction in Petitioner's trial and that rejected by this Court in *Kozminski.* Petitioner's jury received instructions which allowed the trier of fact to find criminal culpability by means not provided by law. In such a situation, the general rule is:

> "That a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and because one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground."

Zant v. Stephens, 462 U.S. 862, 881 (1983).

Specifically, the jury below was instructed with alternative grounds on which to base a guilty verdict: physical or legal coercion *or by other means.* There is no procedure by which to determine which theory Petitioner's jury as a whole, or each individual juror, utilized in deliberations. The Ninth Circuit's cursory analysis of the questioned jury instruction—and for that matter the most important jury instruction in this case—was tailored to a selective assessment of the alternative means by which the jury was led to believe it could convict:

> "All of the evidence at Kimes' trial, however, was designed to demonstrate that she engaged in physical or legal coercion to keep the victims in her service. The Government pursued no 'brain washing' theory of the type found inappropriate in *Kozminski*. Therefore, regardless of the instruction concerning the relevance of what the victims believed, the jury could not have convicted Kimes unless it concluded that she had engaged in 'compulsion of services by the use or threatened use of physical or legal coercion' as required by *Kozminski*, 487 U.S. at 953, 108 S.Ct. at 2765."

Kimes v. United States, *supra*, 939 F.2d at 778.

Notably, the Ninth Circuit supported the trial court's jury instructions despite the clear directives in *Kozminski*:

> "[ ]he Judge instructed the jury that to convict Kimes of holding these women in involuntary servitude it had to find that she kept the women in her employ through force or threat of force. He also told the jury that they could find that Kimes had held any victim in involuntary servitude if she caused that victim 'to believe that she ha[d] no alternative but to perform the labor.' "

United States v. Kimes, *supra*, 939 F.2d at 777-778.

Kozminski clearly confined the limits of involuntary servitude to actual or threatened physical or legal coercion. Psychological manipulation is insufficient to prove involuntary servitude. *Kozminski* further rejected the theory regarding a victim's state of mind and restricted the use of evidence regarding a victim's status. The jury instruction in Petitioner's case below defined involuntary servitude to encompass a means of coercion other than actual or threatened physical or legal coercion. The victims were vividly depicted to the jury as unsophisticated immigrants who believed—focusing on their state of mind —that they had no alternative to staying under the em-

ploy of Petitioner and her husband. Directing the jury's attention to an alternative means of conviction by stressing on the "victim's state of mind" was entirely improper and has now been specifically rejected by this Court of *Kozminski* as a means to instruct a jury in an involuntary servitude prosecution. Not unlike the instruction on involuntary servitude to the jury sitting in the *Kozminski* trial in the United States District Court for the Eastern District of Michigan, Petitioner's trial judge erred by instructing on involuntary servitude which encompassed other means of coercion and may have caused Petitioner to be convicted for conduct which does not violate 18 U.S.C. § 1584. Properly applied, *Kozminski* compels a determination the Petitioner's alleged criminal conduct was insufficient to sustain the conviction under 18 U.S.C. § 1584.

Nor can it be said that Petitioner is barred from continuing to assert her claims under *United States v. Frady*, 456 U.S. 152, 167-8 (1982) where this Court held that a federal prisoner who has defaulted on a claim which is sought to be adjudicated in a 28 U.S.C. § 2255 Motion must satisfy the cause and actual prejudice standard set out in *Francis v. Henderson*, 425 U.S. 536 (1976) and *Wainwright v. Sykes*, 433 U.S. 72 (1977). In *Reed v. Ross*, 468 U.S. 1, 15-6 (1984), this Court announced the rule that a habeas corpus petitioner has cause for failing to raise a claim if the claim had no reasonable basis in existing law. Simply, where a decision of this Honorable Court represents a clear break from prior law, the application of new decisional law can be a basis for a later collateral attack on the criminal conviction. The Ninth Circuit's misapplication of *Kozminski*'s definition of involuntary servitude evidenced in the case under review was unquestionably colored by the Court of Appeals' prior, and now discredited, analysis in *United States v. Mussry*, *supra*. Petitioner has satisfied the "cause" requirement. The prejudice which has inured to Petitioner is obvious:

as a direct and proximate result of the District Court's following of a later determined to be erroneous interpretation of 18 U.S.C. § 1584, Petitioner was convicted and imprisoned.

Therefore, the decision of the United States Court of Appeals for the Ninth Circuit is erroneous in that it misapplied this Honorable Copurt's change of the interpretation of 18 U.S.C. § 1584.

II. THE DECISION OF THE NINTH CIRCUIT UNDER REVIEW PERPETUATES THE CONFLICT AMONG THE CIRCUIT COURT INTERPRETATIONS OF 18 U.S.C. § 1584 RESOLVED IN *KOZMINSKI.*

In *United States v. Kozminski, supra*, this Court specifically granted the Government's Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit to resolve a conflict among several federal courts of appeal defining involuntary servitude in criminal prosecutions under 18 U.S.C. §§ 241 and 1584. *Kozminski, supra*, identified six decisions which had interpreted and/or applied 18 U.S.C. § 241 and/or § 1584: *United States v. Schakney*, 333 F.2d 475 (2d Cir. 1964); *United States v. Harris*, 701 F.2d 1095 (4th Cir. 1983); *United States v. Bibbs*, 564 F.2d 1165 (5th Cir. 1977); *United States v. Kozminski*, 821 F.2d 1186 (6th Cir. 1987) (En banc); *United States v. Mussry*, 726 F.2d 1448 (9th Cir. 1984) *cert. denied sub nom. Singman v. United States*, 469 U.S. 855, 105 S.Ct. 180, 831 L.Ed.2d 114 (1984); and, *United States v. Warren*, 772 F.2d 827 (11th Cir. 1985). Of these decisions, the *Kozminski* majority agreed with the interpretations reached in the Second Circuit opinion of *United States v. Schakney, supra*, and the Sixth Circuit's assessment in *United States v. Kozminski, supra.*

Assessing the enactment of § 1584 of Title 18 of the United States Code, this Court specifically concluded that Congress did not intend that § 1584 encompass a "broad

and undefined concept of involuntary servitude urged" by the Government. *United States v. Kozminski, supra*, 108 S.Ct. at 2764. The majority of this Court, whose judgment was concurred with by all other members in separately concurring or joining opinions, agreed with the reasoning of the Second Circuit in *Schakney* that:

> "[t]he most ardent believer in civil rights legislation might not think that cause would be advanced by permitting the unlawful machinery of the criminal law to be brought into play whenever an employee asserts that his will to quit has been subdued by a threat which seriously affects his future welfare but as to which he still has a choice, however, painful."

United States v. Schakney, 333 F.2d at 487 quoted in *United States v. Kozminiski*, 108 S.Ct. 2751. To be sure, supporting this conclusion this Court acknowledged that:

> "This is our first occasion to consider the reach of this statute [, 18 U.S.C. § 1584]. The pivotal phrase, 'involuntary servitude' clearly was borrowed from the Thirteenth Amendment. Congress' use of the constitutional language in a statute enacted pursuant to its constitutional authority to enforce the Thirteenth Amendment guarantee makes the conclusion that Congress intended the phrase to have the same meaning in both places logical, if not inevitable. In the absence of any contrary indications, we therefore give effect to congressional intent by construing 'involuntary servitude' in a way consistent with the understanding of the Thirteenth Amendment that prevailed at the time of § 1584's enactment. See, *United States v. Schakney*, 333 F.2d 475 (CA 2 1964) (Friendly, J.).
>
> Section 1584 was enacted as part of the 1948 revision to the criminal code. At that time, all of the court's decisions identifying conditions of involuntary servitude had involved compulsion of services through the use or threatened use of physical or legal coercion.

> See, *e.g.*, *Clyatt v. United States*, 197 U.S. 207 (1905); *United States v. Reynolds*, 235 U.S. 133 (1914); *Pollock v. Williams* [322 U.S. 4 (1944)] . . . ; *Bailey v. Alabama*, 211 U.S. 452 (1908). By employing the constitutional language, Congress apparently was focusing on the prohibition of comparable conditions.
>
> The legislative history of § 1584 confirms this conclusions and undercuts the government's claim that Congress had a broader concept of involuntary servitude in mind. . ."

United States v. Kozminski, supra, 108 S.Ct. at 2761.

Notably, this Court agreed with the interpretation of § 1584 and, to a great extent, the proper application of § 1584 by the United States Court of Appeals for the Sixth Circuit sitting en banc. The Sixth Circuit's definition of involuntary servitude, according to this Court, was in conflict with the definitions attributed to § 1584 by other courts of appeal, including *United States v. Mussry, supra*, a decision of the Ninth Circuit.

However, by adopting Judge Friendly's opinion of the Second Circuit in *United States v. Shackney* and affirming the Sixth Circuit's reversal of the Kozminski convictions with directives to remand the case for a new trial, this Court rejected the interpretation of the Ninth Circuit of § 1584 which, in the words of this Court, did not limit,

> ". . . the reach of § 1584 to cases involving physical force or legal sanction, but has concluded that:
>
> '[a] holding in involuntary servitude occurs when an individual coerces another into his service by improper or wrongful conduct that it is intended to cause, and does cause, the other person to believe that he or she has no alternative but to perform labor.' "

United States v. Kozminski, 108 S.Ct. at 2758 quoting *United States v. Mussry*, 726 F.2d 1448, 1453 (9th Cir.

1984), *cert. denied, sub nom. Singman v. United States*, 469 U.S. 855, 105 S.Ct. 180, 83 L.Ed.2d 114 (1984).

So compelling is Petitioner's argument that the opinion, express and underlying rationale of the Ninth Circuit in *United States v. Mussry* have been rejected that the balance of the majority opinion in *Kozminski*, did not mention *United States v. Mussry, supra*, an obvious indication that its interpretation of § 1584 was not persuasive to the five member majority of this Court. Yet, in the decision under review, *Kimes v. United States*, the Ninth Circuit merely recited that at the time of Petitioner's trial *United States v. Mussry* "permitted a conviction for involuntary servitude where the means of compulsion used consisted of merely psychological coercion." *United States v. Kimes, supra*, 939 F.2d at 778.

The Ninth Circuit did *not* acknowledge that interpretation of § 1584 in *United States v. Mussry* was rejected by *Kozminski* opting to mention that this Court subsequently announced that physhological coercion is insufficient ot bring a defendant's conduct within the ambit of an involuntary servitude prosecution and therefore not the basis of a conviction. *United States v. Kimes, supra.* But, the Ninth Circuit has perpetuated the conflict among the circuit court interpretations of 18 U.S.C. § 1584 resolved by this Court in *Kozminski* by legislating that *Kozminski*'s interpretation of this statute is *only* ". . . aimed at excluding prosecutions under the statute for psychological coercion of the type of which cults are often accused." *United States v. Kimes, supra*, 939 F.2d at 778.

In sharp contrast, this Court specifically directed that in prosecutions under § 1584 or for that matter § 241 of Title 18 of the United States Code the jury ". . . must be instructed that compulsion of services by the use or threatened use of physical or legal coercion is a *necessary* incident of a condition of involuntary servitude." *United States v. Kozminski, supra*, 108 S.Ct. at 2765

(Emphasis added). An instruction which included alternative bases for the prosecution and which did not specifically identify the use or threatened use of physical or legal coercion as a necessary predicate of a condition of involuntary servitude would be an erroneous statement of the law and therefore any conviction which did not identify what this Court regarded as a 'bright line" instruction of what § 1584 requires would have to be reversed. As this Court observed an instruction which encompasses other means of coercion may cause a conviction for conduct which does not violate § 1584.

To permit the decision of the Ninth Circuit to stand on its interpretation of § 1584 and its application *Kozminski* would perpetuate the conflict among the circuit court decisions resolved in *Kozminiski.* To reverse the Court of Appeals would correct the manifest injustice evidenced by Petitioner's conviction.

CONCLUSION

For the foregoing reasons it is respectfully requested that the Writ of Certiorari should be granted on the questions presented.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 89-15970

SANTEE KIMES,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court
for the District of Nevada

Argued and Submitted Jan. 14, 1991
Decided July 24, 1991

Before SCHROEDER, PREGERSON and NELSON, Circuit Judges.

SCHROEDER, Circuit Judge:

Santee Kimes was convicted of various counts of involuntary servitude, transportation of illegal aliens, conspiracy, aiding and abetting and escape. She now appeals the district court's order denying her post-conviction motion to vacate that conviction under 28 U.S.C. § 2255. Her most important contention is that, because of a

change in the interpretation of 18 U.S.C. § 1584, which prohibits holding another in involuntary servitude, the conduct for which she was convicted on the involuntary servitude counts is no longer illegal. *See United States v. Kozminski*, 487 U.S. 931, 108 S.Ct. 2751, 101 L.Ed.2d 788 (1988). She also alleges that she was denied a fair trial because of the presence of the jury of her neighbor, whom Kimes claims was biased. In this connection she further asserts that her attorney's failure to object to the service of this juror rendered his assistance ineffective. We affirm.

Involuntary Servitude

At Kimes' trial, the government presented evidence that Kimes and her husband recruited young, female illegal aliens from Mexico to work for them as maids. The evidence showed that Kimes isolated these women, allowing them no contact with their families, no use of the mail or telephone, and virtually no contact with others. Kimes used locks and fences and threats of deportation to keep the victims from leaving the premises. In addition, she physically abused some of them.

The judge instructed the jury that to convict Kimes of holding these women in involuntary servitude it had to find that through force or threat of force. He also told the jury that they could find that Kimes had held any victim in involuntary servitude if she caused that victim "to believe that she ha[d] no alternative but to perform the labor." The jury convicted Kimes, all of which involved women Kimes physically abused and/or threatened with abuse or deportation.

At the time of Kimes' trial, the law of the Ninth Circuit permitted a conviction for involuntary servitude where the means of compulsion used consisted of merely psychological coercion. *See United States v. Mussry*, 726 F.2d 1448 (9th Cir.), *cert. denied sub nom. Singman v. United States*, 469 U.S. 855, 105 S.Ct. 180, 83 L.Ed.2d 114 (1984). Subsequently, the Supreme Court announced

that psychological coercion is not sufficient to bring a defendant's conduct within the purview of the statute forbidding involuntary servitude. Rather, the defendant must be guilty of bringing physical or legal coercion to bear on the victim. *United States v. Kozminski*, 487 U.S. 931, 108 S.Ct. 2751, 101 L.Ed.2d 788 (1988). Kimes contends that this change in the law renders the conduct for which she was convicted no longer criminal. She points out that the district court, in keeping with the law of the Ninth Circuit at the time, instructed the jury that it could convict her if she caued the victims to believe that they had no alternative but to serve her. Under *Kozminski*, such conduct would not be sufficient to support a conviction under the involuntary servitude statute.

In *Kozminski*, the government had relied in part on a theory that the Kozminskis had "brainwashed" their victims into remaining in their employ. *See* 487 U.S. at 936, 108 S.Ct. at 2756. It was this theory that the Court rejected. *Kozminski*, therefore, would require us to grant Kimes' section 2255 petition if she had been convicted based upon evidence of psychological coercion in addition to evidence of legal and physical coercion. *See Reed v. Ross*, 468 U.S. 1, 17, 104 S.Ct. 2901, 2911, 82 L.Ed.2d 1 (1984) (where Supreme Court decision represents a clear break from prior law, it can be a basis for a collateral attack on a prior conviction). Kimes' failure to object to the jury instruction is not fatal to her petition, since well settled law precluded her claim at the time. *Id.*

All of the evidence at Kimes' trial, however, was designed to demonstrate that she engaged in physical or legal coercion to keep the victims in her service. The government pursued no "brainwashing" theory of the type found inappropriate in *Kozminski*. Therefore, regardless of the instruction concerning the relevance of what the victims believed, the jury could not have convicted Kimes unless it concluded that she had engaged in

"compulsion of services by the use or threatened use of physical or legal coercion," as required by *Kozminski*, 487 U.S. at 953, 108 S.Ct. at 2765. *Kozminski* was aimed at excluding prosecutions under the statute for psychological coercion of the type of which cults are often accused. Because there was no evidence of this type of psychological coercion presented, the instruction at issue could not have resulted in an unlawful conviction. *United States v. Frady*, 456 U.S. 152, 102 S.Ct. 1584, 1595-96, 71 L.Ed.2d 816, *reh'g denied*, 456 U.S. 1001, 102 S.Ct. 2287, 73 L.Ed.2d 1296 (1982) ("[defendant] must shoulder the burden of showing, not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage") (emphasis in original).

The Alleged Biased Juror

Kimes also asserts that her conviction should be vacated because one juror was biased against her. This juror lived in Kimes' neighborhood, and Kimes now claims that she and the juror had altercations prior to the trial. During voir dire, this juror gave her true address, and answered in the negative when asked if she had ever met Kimes. Kimes participated in the voir dire, but did not object to this juror or claim any prior relationship.

Because Kimes failed to challenge this juror at the time of trial, in order to prevail she must show cause for her failure to object and actual prejudice due to that juror's presence. *Graham v. Mabry*, 645 F.2d 603 (8th Cir. 1981). *See Wainwright v. Sykes*, 433 U.S. 72, 86-87, 97 S.Ct. 2497, 2506-07, 53 L.Ed.2d 594, *reh'g denied*, 434 U.S. 880, 98 S.Ct. 241, 54 L.Ed.2d 163 (1977) (applying cause and prejudice test to the analogous contemporaneous objection rule applicable to evidentiary questions). Kimes claims that the cause for her failure to object to this juror was her mental state at the time of her trial. She asserts that, although she was present at

voir dire, she was incapable of recognizing this jurors as a person who was biased against her.

The district court held an evidentiary hearing at which it found that Kimes was sufficiently aware of the facts and sufficiently mentally competent at the time of voir dire to have acquiesced knowingly to the service of this juror. This finding, based in large part on the district court's determination of the credibility of witnesses who testified at the evidentiary hearing, cannot be rejected unless it is clearly erroneous. *Anderson v. Bessemer City*, 470 U.S. 564, 575-77, 105 S.Ct. 1504, 1512-13, 84 L.Ed.2d 518 (1985). There was no clear error here. Kimes has not met the cause prong of the test.

In addition, Kimes has not shown the prejudice that is necessary to allow her to pursue her claim. At the evidentiary hearing on Kimes' petition in the district court, the juror in question testified that she gave truthful information on voir dire. She stated that at some point during the trial she noticed that Kimes' address was in her neighborhood, but did not view this information as cause for alarm since she had never met Kimes and had previously disclosed her own address to the court. The judge found this testimony credible, and disbelieved the contrary testimony offered by Kimes. This finding was not clearly erroneous, and mandates the conclusion that this juror was not biased. Therefore, Kimes would not be entitled to a new trial based on this juror's service even if Kimes had cause for her failure to object.

Kimes' final contention is that she received ineffective assistance of counsel. She bases this claim on her attorney's failure to object to the service of the allegedly biased juror. To prevail on an ineffective assistance of counsel claim in a collateral attack, a petitioner must show that her attorney's "performance was deficient" and that this deficiency "prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, *reh'g denied*, 467 U.S. 1267, 104 S.Ct. 3562, 82 L.Ed.

2d 864 (1984). At the evidentiary hearing, the district court evaluated testimony concerning the amount of information Kimes' counsel had about the alleged bias of this juror, and ultimately believed the attorneys' assertion that he did not have sufficient knowledge to believe that there was cause to object to this juror's serving on the jury. This factual finding was not clearly erroneous. The attorney's performance was therefore not deficient within the meaning of *Strickland v. Washington*. Furthermore, since the district court determined that the juror truthfully responded to questions that would have revealed any hostility toward or knowledge of the defendant, and there is no clear error in that determination, there could have been no prejudice in any event.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CR-S-85-134-HDM

UNITED STATES OF AMERICA,
Plaintiff,

v.

SANTE KIMES,
Defendant.

ORDER

[Entered Jun. 28, 1989]

The defendant, Sante Kimes, was convicted of fourteen counts of conspiracy, transportation of illegal aliens, involuntary servitude, and escape on February 28, 1986. She was sentenced on May 15, 1986. On October 30, 1987, she filed the pending motion pursuant to 28 U.S.C. § 2255. Subsequently, she filed supplemental motions. These combined motions raise three issues for determination by the court.

Kimes contends one of the jurors was biased against her, and she was, therefore, denied the right to an impartial jury. Second, she contends that under the holding of *United States v. Kozminski*, 108 S.Ct. 2751 (1988), she was convicted and punished for acts which the law does not make criminal as a consequence of an improper jury instruction. Finally, Kimes contends she received ineffective assistance of counsel during her trial and on appeal.

First, on the issue of jury bias, Kimes alleges that during the voir dire of prospective jurors, one of the jurors, Rhonda Shonkwiler, failed to disclose her acquaintance with Kimes, and that had she disclosed her acquaintance with Kimes, it would have been revealed that she was biased against her. In addition, Kimes contends she failed to notice that Shonkwiler was on the panel until mid-way through the trial, at which time she immediately notified her counsel, and her counsel advised her that the judge had indicated it was too late to raise the issue.

During the voir dire of the panel, the jurors were asked collectively whether they knew the movant or the attorneys, and none of the members of the jury panel responded in the affirmative. In addition, the members of the panel indicated that they could be fair and impartial.

The juror, Shonkwiler, lived two houses from Kimes in the spring of 1985. Kimes contends that Shonkwiler visited her home and, on occasion, talked with the Kimes's maids. On one occasion, Kimes contends she had dinner with Shonkwiler at a restaurant in Las Vegas, and on another occasion, three people, including Elena Duda, testified that the juror Shonkwiler had an altercation with Kimes in connection with the parking of a vehicle on the street next to the residence. Finally, there was testimony that Kimes and Shonkwiler had a problem involving a loose dog in the neighborhood.

The government called Rhonda Shonkwiler who categorically denied any knowledge of Sante Kimes. She testified that while she lived in the Kimes's neighborhood, she had never met Kimes and had never been in Kime's home, nor had she met the maids who worked for Kimes. She further testified that she had never had an altercation with Kimes over a vehicle and had never had dinner with Kimes at the Limelight Restaurant in Las Vegas. She further testified that she answered questions truthfully in response to questions posed to her by the court during jury selection when she said she did not know Sante Kimes and could be a fair and impartial juror.

The government also called witnesses who impeached the testimony of the maids in connection with the time periods the Kimses were physically present in Las Vegas. The former attorney for Kimes, Dominic Gentile, denied advising Kimes that the judge indicated it was "too late" to challenge a juror, and he denied that Kimes advised him that Shonkwiler was a biased juror.

A party is not entitled to a new trial unless a juror's failure to disclose denied the party the right to an impartial jury. *McDonough v. Greenwood*, 464 U.S. 548 (1983). Before a party is entitled to a new trial, the party must establish that a juror failed to answer honestly a material question to a voir dire, and further show that a correct response would have provided a valid basis for the challenge for cause. *McDonough* at 556. Kimes bears the burden of showing partiality. *Irvin v. Dowd*, 366 U.S. 717, 724 (1961). The law requires truthful answers to the questions posed during the voir dire. Any untruthful response may indicate an effort to conceal bias. This would provide the basis for challenge for cause. *United States v. Perkins*, 748 F.2d 1519, 1532-33 (11th Cir. 1984). *Hard v. Burlington Northern Railroad Co.*, 870 F.2d 1454 (9th Cir. 1989).

The issue of juror bias raised in these proceedings turns on the question of the credibility of witnesses. Here, the evidence adduced at the evidentiary hearing established that juror Shonkwiler had requested to be excused from jury service because of commitments which she had. It seems unlikely she would have concealed her knowledge of Kimes if, in fact, she had had altercations with Kimes and was well acquainted with her, since any such revelation would have assisted her in being excused from jury duty. On the other hand, the witnesses called on behalf of Kimes were either relatives or close friends who have demonstrated a strong bias in connection with this case. The evidence at trial established that Kimes did not permit the maids to socialize with neighbors. It is, therefore,

unlikely that Shonkwiler would have had the type of access to the Kimes's home portrayed by the defendant, particularly if they were not friendly.

The court concludes that Kimes failed to establish by credible evidence that Shonkwiler was a biased juror. The presence of juror Shonkwiler on the jury did not deprive Kimes a fair trial.

Next, the defendant contends her conviction for conspiracy and involuntary servitude should be vacated as a result of the United States Supreme Court decision in *United States v. Kozminski*, 108 S.Ct. 2751 (1988). She alleges she was convicted and punished for acts which the law does not make criminal.

In *Kozminski*, the United States Supreme Court held that involuntary servitude exists when a victim is coerced to work by the use or threat of physical restraint or physical injury or the use or threat of legal coercion. The court declined to extend the definition of involuntary servitude to include only psychological coercion. *Kozminski, supra*, at 19. The court held that the jury must be properly instructed on the words involuntary servitude.

In this case, the court instructed the jury as follows:

> The first element is that the victim must have been held in a state of involuntary servitude by the defendant. Let me explain to you what the words involuntary servitude mean.
>
> Involuntary servitude means a condition of enforced compulsory servitude of one to another. The means used to compel a person to perform servitude are immaterial.
>
> In considering whether a defendant held certain persons in a condition of compulsory service, that is, whether the service was involuntary, you may consider the evidence of force, threats, intimidation or other means of compulsion. You may consider

whether the defendant used means of compulsion sufficient in kind and degree to subjugate the will of an ordinary person having the same general station in life and background and experience as that of the alleged victims and to cause the alleged victims to believe that they had no reasonable means of escape and no choice except to remain in the service of Sante Kimes and Kenneth Kimes.

An employer who merely provides an opportunity for a person to work for low wages or simply takes advantage of circumstances created by others is not guilty of an offense. An employer who has not engaged in improper or wrongful conduct has not violated the law.

In determining whether the service was involuntary, you are instructed that it makes no difference whether or not the persons alleged to have been held in involuntary servitude initially agreed voluntarily to work. If a person desires to withdraw and then is forced to remain and perform services against her will, then her service is involuntary.

It also makes no difference whether the persons alleged to be held to involuntary service were or were not paid or given a stipend. If you find that they were forced by a defendant to provide service against their will, then the payment of money is not a defense to the charges of involuntary servitude. The crucial factor is whether a person intends to and does coerce an individual into her service by subjugating the will of the other person.

A holding and involuntary servitude occurs when an individual coerces another into her service by improper or wrongful conduct that is intended to cause and does cause the other person to believe that she has no alternative but to perform the labor.

At the time this instruction was given, counsel for the defendant acknowledged that it was consistent with the

law in the Ninth Circuit. *United States v. Mussry*, 726 F.2d 1448 (9th Cir. 1984). At the trial the defendant argued that the authority of *United States v. Shackney*, 333 F.2d 475 (2d Cir. 1964), should control since the facts of the instant case were "no more egregious than those set forth in *Shackney*." The court finds that the jury in this case was instructed in a manner not inconsistent with *Kozminski*. The jury instructions discuss the requirement of coercion in terms that could, in light of the evidence against the defendant, only have been construed by the jurors to mean the kind of physical or legal coercion defined by *Kozminski*. The record supports this conclusion. It reflects that the jury acquitted the defendant on two counts of involuntary servitude in which there was no actual physical force used. Under Count V, the jury acquitted the defendant. The only evidence against the defendant under Count V was that she raised her hand one time while yelling. There was no physical contact with the maid.

The evidence under Count VI established there was no physical contact with the maid and that the defendant only made a fist and brought it close to the maid's face.

A review of the record reveals the jury convicted the defendant on only those counts which involve both physical and legal coercion. The jury's verdicts were consistent with the definition of involuntary servitude enunciated in *Kozminski*. The jury convicted the defendant on five counts of involuntary servitude, one count for each of the five victims. Under Count II there was substantial evidence of actual physical coercion in which it was shown that the defendant slapped the maid, Delores Salgado, and deliberately burned her. Under Count III, the evidence showed the defendant beat the maid, Adela Guzman, with a wire and wooden coathangers and a belt buckle and repeatedly slapped her. Under Count VII, the evidence established the defendant pushed and struck the maid, Amalia Osorio. Under Count VIII, the defendant burned the maid, Mirabel Cruz, with a hot iron. Under

Count IX, the evidence established the defendant physically restrained and confined the maid, Maria Vasquez, for a three-month period in several locations across the country and locked her in the house. This same evidence was used to establish the conspiracy under Count I. In short, there was substantial evidence under each count of conviction to show the defendant's physical restraint and abuse of the victims.

The indictment reflects the nature of the physical restraint and coercion as well as the legal coercion through the threat of deportation. After considering the record, the court concludes there was a sufficient evidentiary foundation to support the finding of the defendant's repeated and persistent use of physical and legal coercion against the victims as to the counts of conviction. Since the guilty *verdicts* related to only those counts that involved actual physical and legal coercion, the court concludes the convictions rested upon a permissible foundation under the authority of *Kozminski*.

Finally, Kimes asserts she received ineffective assistance of counsel during her trial and her appeal. She alleges four areas of ineffective assistance of counsel. First, she contends her attorney improperly failed to respond to her complaints about the juror, Rhonda Shonkwiler. Second, she asserts her attorney failed to object to the jury instruction regarding involuntary servitude. Third, she contends her attorney was disloyal, and finally, she asserts her attorney failed to appeal the jury instruction regarding involuntary servitude.

In *Strickland v. Washington*, 466 U.S. 668, 688 (1983), the United States Supreme Court established the standard for judging a criminal defendant's contention that the Constitution requires a conviction to be set aside as a result of ineffective assistance of counsel. The first factor to consider is whether considering all of the circumstances the attorney's performance fell below an objective standard of reasonableness. Second, the defendant must

affirmativly prove prejudice. In this connection, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Strickland*, 466 U.S. at 692. As the high court held "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland* at 690.

The defendant's first contention is that her attorney failed to properly represent her in the selection and retention of Rhonda Shonkwiler as a juror. This court has previously determined that the defendant has failed to establish that Rhonda Shonkwiler was a biased juror and should have been excused. In any event, the defendant participated in the jury selection process and was aware of the existence of Shonkwiler on the jury. Counsel for Kimes has testified that at no time during the course of the trial did the defendant indicate that she had disputes with Shonkwiler of the type raised in her motion, and there is no indication that defendant's counsel representation fell below an objective standard of reasonableness on the selection and retention of Rhonda Shonkwiler as a juror.

Second, the defendant contends her attorney's failure to object to the jury instruction regarding involuntary servitude fell below the *Strickland* standard. The instruction given fully comported with Ninth Circuit law at the time the jury was instructed in this case. Further, the evidence established the defendant's criminal conduct met the more restrictive standards of involuntary servitude as those were defined in *United States v. Shackney*, 33 F.2d 475 (2d Cir. 1964). Therefore, I conclude the defendant has failed to establish that her counsel's failure to object to the instructions given by the court constituted ineffective assistance of counsel.

The court finds the defendant's other contentions involving ineffective assistance of counsel are without merit.

Therefore, it is ORDERED that the defendant's motion pursuant to 28 U.S.C. § 2255 is DENIED.

DATED this 27th day of June, 1989.

/s/ Howard D. McKibben
United States District Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 89-15970

D.C. #CV-S-88-0600-HDM
(District of Nevada)

SANTEE KIMES,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

OPINION

[Filed Sep. 12, 1991]

Before: SCHROEDER, PREGERSON and T.G. NELSON, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX D

EXCERPT OF GOVERNMENT SUMMATION AT TRIAL:

United States v. Kimes
Case No. CR-LV-85-134 HDM
(D.Ct. Nev. 2/26/86)
TR. P 10

"The defendant purposefully sought the most vulnerable kinds of persons so that it would be relatively easy for her to trick them into trusting her at the beginning and then later to overcome their wills when they were far away from their families and far away from their loved ones. The Kimes enticed them with false promises. They used phony names. They used phony addresses and phony phone numbers of where the young girls would be working to get them away from their families. They lied about the pay. They lied about the nature of the work. And they lied about days off."

APPENDIX E

EXCERPT OF GOVERNMENT REBUTTAL
AT TRIAL:

United States v. Kimes
Case No. CR-LV-85-134 HDM,
(D.Ct. Nev. 2/27/86)
TR. PP. 22-23

"A further definition the judge will tell you of involuntary servitude, it means a condition of enforced compulsory servitude of one to another. The means used to compel the servitude are immaterial. But in considering whether a defendant held certain persons in a condition of compulsory servitude, whether the servitude was involuntary, you may consider evidence of force, threats, intimidation or other means of compusions. You may consider whether the defendant used the means of compulsion sufficient in kind and degree to subjugate the will of an ordinary person having the same general station and life in background and experience as that of the victims and to cause the victims to believe that they have no reasonable means of escape and no choice except to remain in the service of Sante and Kenneth Kimes."

APPENDIX F

EXCERPTS OF PERTINENT JURY INSTRUCTIONS GIVEN AT TRIAL:

United States v. Sante Kimes
Case No. CR-LV-85-134 HDM
D.CT.NEV. 2/27/86, TR. 131-133

"Now, Counts II, III, V, VI, VII, VIII and IX of the Indictment charge the defendants, Santee Kimes and Kenneth Kimes, with having violated Section 1584 of Title 18 of the U.S. Code. Each of those counts are counts relating to the crime of involuntary servitude and aiding and abetting.

Counsel again have stipulated that it's unnecessary for me to re-read those sections of the Indictment to you. You'll have them in the jury room with you.

Title 18 of the U.S. Code Section 1584 provides as follows:

Whoever knowingly and wilfully holds to involuntary servitude or sells into condition of involuntary servitude any other person for any term or brings within the United States any person so held shall be guilty of an offense against the United States.

Before a verdict of guilty may be found as to each of these counts the Government must prove the following elements of the offenses charged in Counts II, III, V, VI, VII, VIII and IX beyond a reasonable doubt. And these are the elements:

First. A holding of the named victim to involuntary servitude by the defendant.

Second. Such holding must have been accomplished by the defendant knowingly and wilfully.

And third. Such holding must have been for a term.

The first element is that the victim must have been held in a state of involuntary servitude by the defendant.

Let me explain to you what the words involuntary servitude mean.

Involuntary servitude means a condition of enforced compulsory servitude of one to another. The means used to compel a person to perform servitude are immaterial.

In considering whether a defendant held certain person in a condition of compulsory service, that is, whether the service was involuntary, you may consider the evidence of force, threats, intimidation or other means of compulsion. You may consider whether the defendant used means of compulsion sufficient in ind and degree to subjugate the will of an ordinary person having the same general station in life and background and experience as that of the alleged victims and to cause the alleged victims to believe that they had no reasonable means of escape and no choice except to remain in the service of Santee Kimes and Kenneth Kimes.

Economic necessity may cause persons to accept jobs they would prefer not to perform or to work for wages they would prefer not to work for. While this may cause persons to feel they are coerced into laboring at those jobs, such conditions do not constitute involuntary servitude.

An employer who merely provides an opportunity for a person to work for low wages or simply takes advantage of circumstances created by others is not guilty of an offense. An employer who has not engaged in improper or wrongful conduct has not violated the law.

In determining whether the service was involuntary, you are instructed that it makes no difference whether or not the persons alleged to have been held in involuntary servitude initially agree voluntarily to work. If a person desires to withdraw and then is forced to remain and perform services against her will, then her service is involuntary.

It also makes no difference whether the persons alleged to be held to involuntary service were or were not paid or given a stipend. If you find that they were forced by a defendant to provide service against their will, then the payment of money is not a defense to the charges of involuntary servitude. The crucial factor is whether a person intends to and does coerce an individual into her service by subjugating the will of the other person.

A holding in involuntary servitude occurs when an individual coerces another into her service by improper or wrongful conduct that is intended to cause and does cause the other person to believe that she has no alternative but to perform the labor.

Now, with regard to the second element, the Government must prove that the defendant acted knowingly and wilfully in holding the victim to a condition of involuntary servitude."